

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3767 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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SHAKIL AHMED ABDUL MUTTALIB

Versus

UNION OF INDIA

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Appearance:

MR KR JANI for Petitioner

Mr.S.C.Patel, Addl. Standing Counsel for Respondent No. 1

Mr.P.S.Champaneri, AGP, for Respondent No. 2, 3, 4

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CORAM : MR.JUSTICE S.M.SONI

Date of decision: 08/05/96

ORAL JUDGEMENT

Order of detention dated 17.8.94 passed by Additional Chief Secretary to Government, Home Department, Sachivalaya, Gandhinagar, on being satisfied with respect to the petitioner with a view to preventing him from smuggling goods under sec.3(1) of the Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974 (COFEPOSA) in exercise of powers conferred on him by Government Order, Home Department No.GG/134/SB.IV/PSA/1086/360, is under challenge in this petition.

On 22.2.94, an information was received that the detenu had arranged import of luxurious consumer goods at Kandla in container no.ICSU 5043939 from Dubai in MV IAL GOVERNOR VOY/015. The detenu had approached the Manager of M/s.Penguin Shipping Agency Pvt.Ltd. Shri G.V.Kharod, under whose agency the container was plying between Dubai and Kandla Port. On presenting copies of Bills of Lading, detenu requested to issue delivery order with respect to the said container. Shri Kharod, therefore, told him to get the said container examined by the Customs Officers before issue of delivery order. Accordingly, on examination of the said container, Customs Officer concerned was informed that the said cargo contain certain articles in the name of persons referred in the grounds. He was also informed that the cargo contain household goods under transfer of residence. However, on examination of the said container, instead of household goods, goods of foreign origin in commercial quantity were found. Said goods were seized under reasonable belief that these were not used for personal effects and household goods as indicated in the import document and as such the same were liable for confiscation under the provisions of Customs Act, 1962. On recording the statements of the concerned persons, the authority was satisfied that the detenu was involved in smuggling goods.

Petitioner was served with the grounds and necessary documents on the premises on which the subjective satisfaction was recorded to pass the order of detention. Thereafter, the declaration under sec. 9(1) of COFEPOSA is issued on 21.9.94 by Additional Secretary to the Government of India, one Mr.N.N.Mookerjee, being Declaration no.23/94. In the said declaration, said Additional Secretary to the Government of India i.e. Specially Empowered Officer, informed the detenu that he can make a representation to the Central Government as well as to the Advisory Board against the said declaration in the manner specified in the grounds of detention. By the grounds of detention, Specially Empowered Officer by the State of Gujarat had already informed the detenu that he can make a representation to the detaining authority, to the State Government, to the Central Government and to the Advisory Board. This order of detention as well as declaration are challenged in this petition. However, learned Advocate Mr.Jani has limited his challenge to the Declaration only.

Mr.Jani has challenged the legality and propriety of the declaration on the ground that the detenu has not been informed of his valuable constitutional right to make a representation to the declaring Officer (Specially Empowered Officer), who is Additional Secretary to the Government of India Mr.N.N. Mookerjee. As the petitioner is not informed of the said constitutional right, he could not make representation before that authority and the continued detention is vitiated.

Mr.Jani contended that in view of the judgment in the case of Kamleshkumar Ishwardas Patel vs. Union of India & Ors (1995) 4 SCC 51, it is the duty of the detaining authority to inform the detenu about his right to make a representation and name the authority to whom he has to make a representation. In the instant case, as the declaring authority has not informed the detenu about his right to make a representation to the declaring authority, his right under Article 22(5) of the Constitution of India is violated and the continued detention is vitiated thereby.

Learned Additional Standing Counsel Mr.S.C.Patel contended before the court that the declaring authority has informed the detenu that he can make a representation to the Central Government and he was acting as a Specially Empowered Officer on behalf of the Central Government and informing the detenu that he can make a representation to the Central Government should suffice. He further contended that the detenu has not even made a representation to the Central Government also, though he was initially informed by the detaining authority about his right to make a representation to the Central Government. In view of this fact, it is contended that the right of the detenu to make representation against the declaration has not been violated and, therefore, the continued detention is not vitiated.

In the case of Kamleshkumar (Supra), it is held by the Supreme Court that the detenu has to be informed about his right to make a representation and also he is required to be informed as to which authority the representation can be made. If the declaring authority i.e. Specially Empowered Officer can issue a declaration, he can equally consider whether issuance of declaration is proper or not, after hearing the detenu in view of sec.21 of the General Clauses Act. As the declaring authority is thus having power to reconsider the issuance of declaration, the declaring authority ought to have informed the detenu that a representation

can be made against the declaration to him also. Failure of the declaring authority to inform the detenu about his right to make a representation to the declaring authority has thus vitiated the continued detention inasmuch as this has caused infraction of the constitutional right guaranteed to the detenu under Article 22(5) of the Constitution of India. As the continued detention is vitiated, the declaration issued by the declaring authority i.e. Specially Empowered Officer, is bad and liable to be cancelled and struck down.

As the declaration is struck down, the original order of detention comes into force. In the instant case, order of detention dated 17.8.94 is served on the detenu on 19.8.94 and the original order being for a period of one year, the same has expired. In view of this fact, the petitioner - detenu is required to be set at liberty forthwith.

In the result, the petition is allowed. The order of continued detention is vitiated and as the term of the original order having completed, the petitioner detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule made absolute accordingly. No costs.

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